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Supreme Court of the United States

OCTOBER TERM, 1905

No. 145

The Owensboro Water Works Company, . *Appellant*

v.

The City of Owensboro, ... *Appellee*

Appeal from the Circuit Court of the United States
for the Western District of Kentucky

BRIEF FOR APPELLEE

CHARLES S. WALKER,
For Appellee

Howard Printing Co., Owensboro, Ky.

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May 26, 1904, appellant filed a bill in equity, in the Circuit Court of the United States, Western District of Kentucky, Owensboro Division, against appellee, in which it is averred that appellant and appellee are corporations and citizens of Kentucky ; that appellant owned at the dates named and owns, in the City of Owensboro, Ky., real and personal property subject to taxation, the real property exceeding in value $2,000, (the value of the personal property is not stated,) and that the matters involved are of a common and general interest to all the taxpayers of said city, who are so numerous that it is impracticable to bring them all before the Court, and appellant sues on

behalf of itself and said other taxpayers; that October 10, 1900, the common council of the City of Owensboro, by an ordinance duly passed, provided for an election on the first Tuesday after the first Monday in November, 1900, to ascertain whether or not two-thirds of the voters of said city were in favor of this: "Do you assent to the proposition that the City of Owensboro shall issue $200,000 of its bonds, for the purpose of borrowing money to be used for the erection of a system of water works for supplying the City of Owensboro and the inhabitants of said city with water?"; that the election was regularly and legally held, and the proposition submitted was carried, two-thirds of the voters voting for it; that December 3, 1900, the common council of said city, by ordinance, directed the issue and sale of the bonds for the construction of the water works, and, by it, and an amendment of March 11, 1901, provided for the collection of an annual tax, $14,666.66, to pay the interest, and to create a sinking fund to pay the principal, and to be used for no other purpose; that the bonds were issued, (seven of them were sold before the bill was filed,) and the tax was levied and collected for the years 1901, 1902, 1903, making $44,000 collected, and, as to appellant's, 1904, and the balance, 193 bonds, will be sold unless prevented by injunction; that out of the $44,000 there has been expended, "$20,000 in the purchase of land in said city, upon which said water plant is to be erected, and in sinking wells for the purpose of furnishing water for said system, and in having plans and specifications made for said plant, and $24,000 of said $44,000 has been wrongfully and illegally expended by said city for other purposes than that for which the same was levied and collected;" that this alleged misappropriation paid and extinguished bonds to the amount of $44,000, leaving 149 bonds to be

sold; that if more than 149 of said bonds shall be sold to innocent purchasers, without notice, which said city "is about to do," appellant and the taxpayers, for whom it sues, will be forced to pay the excess, and in this way be deprived of their property without due process of law, which will be in violation of the fourteenth amendment of the Constitution of the United States.

The prayer is that appellee be enjoined from selling any bonds in excess of 149, and from levying and collecting any taxes in excess of an amount sufficient to create a sinking fund with which to pay the interest on, and, ultimately, the 149 bonds when sold and the seven sold.

There is no complaint that either the election, the issuance of the bonds, the levy or collection of the taxes was illegal or, in any way, irregular. It is conceded in the bill that every step was regular and legal, and that the bonds are valid obligations of the city, and the relief is based solely upon the ground that the common council misappropriated $44,000 of money, collected to create a sinking fund to pay the interest on, and, ultimately, the bonds, to other purposes, not stated except in part.

Of the taxes levied for 1904, the averment is "that said sum is being collected and paid into the treasury of said city." (Rec. 6.) So that it must be assumed that appellant had paid its part of the taxes involved for the years 1901, 1902, 1903, 1904, voluntarily and not under protest, before the bill was filed. This applies to the other taxpayers, who have paid, under the allegations of the bill.

Upon demurrers to the bill, the circuit court, in a written opinion, held:

1. The object of the bill is to remedy a misappropriation of money collected by taxation, and, appellant having paid, the

remedy, if any, is at law against the city, or officer who collected it, to recover back the money. (Dows v. City of Chicago, 11 Wall. 112.)

2. It appearing upon the face of the bill that the parties to the suit are corporations and citizens of Kentucky, the court has no jurisdiction under the provisions of the judiciary act, (1 U. S. Com. Sts., p. 508,) because:

a. The bill shows this is not a suit of a civil nature arising under the Constitution or laws of the United States, and that all questions to be determined are upon a construction of the laws of Kentucky, and upon principles of general jurisprudence, and, if any constitutional question can be considered as involved, it is merely incidental. (Tennessee v. Union & Planters' Bank, 152 U. S. 454; Gold-Washing, &c., Co. v. Keyes, 96 U. S. 199; Sloan v. United States, 193 U. S. 614.)

b. The bill shows that "the matter in dispute" does not exceed $2,000, the bill being filed by appellant to protect its individual interest, and to prevent damage to itself. "No claim is made in the bill that the aggregate of taxation levied and to be levied upon the complainant's property in the past, at the present and in the future, growing out of the issue and payment of the $200,000 of bonds and interest thereon, and particularly not as to the $44,000, will ever exceed two thousand dollars. Indeed, it was conceded at the hearing that the aggregate of such taxation would not exceed that sum." (El Paso Water Co. v. El Paso, 152 U. S. 157; Colvin v. Jacksonville, 158 U. S. 460.) The Kentucky Code, sec. 25, has no application in equity suits in the United States courts; but equity rule 48 must govern, which provides:

"Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."

As a rule litigants must sue or defend for themselves, and this case does not fall within any exception. (Scott v. Donald, 165 U. S., 115, 116, 117; Smith v. Swormstedt, 16 How. 303.)

The certificate, which may be assumed to have been signed during the term at which the decree was entered, though this does not clearly appear, was, if signed at that time, signed before, and at a different term from that when, the petition for an appeal, the assignment of errors and bond were filed. (Record 32, 33, 34, 35.) The certificate is as follows:

"And the court and the judge who heard the cause now and hereby certify that one issue considered and adjudged upon the demurrer to the bill of complaint and upon the final judgment in the case was, whether this court had jurisdiction of the action or power to grant the relief prayed for by the complainant or any part thereof and the court, as appears from its said opinion and by the judgment herein considered and adjudged that it had no jurisdiction in the premises, and

> the question of jurisdiction alone is now and hereby certified, under the act of Congress, to the Supreme Court of the United States for decision."

As the court is confined to the certificate in the disposition of the case, the only question involved is that of jurisdiction. (Colvin v. Jacksonville, 158 U. S. 459.)

This case involves taxes actually collected, and a diversion of them. In 2 Smith on The Modern Law of Munic. Corp., sec. 1634, citing City of Grand Rapids v. Blakeley, 40 Mich. 367, 2 Dillon Munic. Corp. sec. 940, Railroad Co. v. Dodge Co. Com'rs., 98 U. S. 541, it is said:

> "The writer will attempt to discuss only those cases in which the taxpayer acts not alone as an individual but as the representative of a class of taxpayers, and seeks to prevent or redress wrongful or illegal taxation on behalf of that class. It is obvious that such cases will arise almost exclusively before the actual collection of the tax. After the tax has been collected each taxpayer must in general take individual action to recover his proportion of the tax."

This action is assumpsit for money had and received. It is certain that tested by this rule, the amount involved does not exceed $2,000. Appellant avers, in effect, that it paid its taxes voluntarily and without compulsion, which amounted to between $100 and $200. It could not recover the taxes paid by it either against the officer who collected it or the city under these circumstances. (Railroad Co. v. Com'rs, 98 U. S. 542.) What-

ever remedy appellant may have had before the collection of the taxes, it seems clear that, after collection, it having paid its part voluntarily, it is without remedy, and, certainly, cannot obtain the relief sought, which is to have bonds to the amount of $44,000 canceled. These bonds, every one of them, were authorized by the vote of the taxpayers, and issued to be sold, the proceeds to be expended in the construction of water works. They could not be sold at a less price than par. (Ky. Sts. sec. 3284.) They could be sold at any price above par obtainable. The relief sought is the cancellation of fo rty-four bonds of the face value of $44,000, although their market value may be much in excess of this, and this relief is asked solely upon the ground that the common council, the representative of the taxpayers, has misappropriated $44,000 of money collected for the purpose of creating a sinking fund to pay the bonds and the interest thereon, as required under section 159 of the Kentucky Constitution. The proceeds from the sale of the bonds become a trust fund that can be used only in the construction of the water works. These bonds must be sold, if a purchaser at or above par can be had, and the proceeds must be invested in the construction of the water works. In this trust fund the contractors, not the bondholders, are interested, as they are to receive, out of it, payment for the construction. This fund cannot be used in the payment of the bonds or the interest thereon. A different and distinct fund must be raised for that purpose by taxation, as provided in section 159 of the Kentucky Constitution, and the ordinance and amendment thereto in accordance therewith. This is, also, a trust fund, distinct from, and independent of, the bond fund, and the bondholders are interested therein, it being the fund out of which the bonds and coupons owned by them are

to be paid. The failure to create the sinking fund as required, or the misappropriation of the taxes collected that should have gone into the sinking fund, cannot invalidate the bonds or any of them, whether sold or not. These bonds must be sold, and the proceeds used in the construction of the water works, and the fact that a certain fund has been misappropriated cannot authorize a diversion of this fund, or defeat the purpose of the taxpayers in creating it. The failure to create the sinking fund, or misapplying the money that should have gone into the sinking fund, cannot destroy or affect the bond fund, or defeat the construction of the water works, any more than any other misappropriation by the common council. The failure to discharge the duties of one trust cannot destroy another and independent trust. And yet this is the real relief sought, the main object of the bill being to deplete the bond fund to an extent that the construction of the water works will be an impossibility, and appellant will be without competition in furnishing the city and its inhabitants with water. The interests of appellant and the taxpayers, for whom it attempts to maintain the action, are antagonistic, and it is, therefore, certain that the action cannot be maintained by it for and on behalf of the taxpayers, either under equity rule 48 or section 25 of the Kentucky Code, which provides:

> "If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all."

The interest of appellant is to prevent the construction of the water works, and this is the sole object of the present suit. The interest of the taxpayers is to have the water works constructed. It is, therefore, manifest that the question does not "involve a common or general interest of many persons," and that appellant does not represent the interest or right of the taxpayers, for whom it attempts to sue. In Smith v. Swormstedt, 16 Howard, 303, this court said :

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. * * *
>
> "The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

And in Scott v. Donald, 165 U. S., 116, this language by Mr. Justice Nelson in Cutting v. Gilbert, 5 Blatchford 259, 261, was approved :

> "The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject matter of the suit."

In Colvin v. Jacksonville, 158 U. S. 456, where the bill was to enjoin the issue, sale or other disposition of a certain issue of bonds to the amount of $1,000,000.00, which was dismissed by the circuit court for want of jurisdiction on the ground that the "amount of taxes which complainant would be obliged to pay as interest and sinking fund, on account of the issue of the bonds, would not exceed $2,000," on pages 460, 461, this court said:

> "This leaves only the question to be considered whether the amount of the interest of complainant, and not the entire issue of the bonds, was the amount in controversy, and, in respect to that, we have no doubt the ruling of the circuit court was correct.
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> "In El Paso Water Co. v. El Paso, 152 U. S. 157, 159, which was a bill filed by the water company against the city of El Paso for an injunction, it was alleged, among other things, that if certain bonds were issued, the complainant would be compelled to pay taxes on its property for the interest on the bonds and to provide a sinking fund for the principal thereof, but the amount of the tax that would be thereby cast upon complainant's property was not disclosed, and we said upon the question whether there was a sufficient amount in controversy to give this court jurisdiction: 'The bill is filed by the plaintiff to protect its individual interest and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5,000. So far as respects the matter of taxes which, by the issue of the bonds, would be cast upon the property of

the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred.' * * *

" Brown v. Trousdale, 138 U. S. 389, 394, is not to the contrary. There several hundred taxpayers of a county in Kentucky, for themselves and others associated with them, numbering about twelve hundred, and for and on behalf of all other taxpayers in the county, 'and for the benefit likewise of said county,' filed their bill of complaint against the county authorities and certain funding officers, and all the holders of the bonds, seeking a decree adjudging the invalidity of two series of bonds aggregating many hundred thousand dollars, and perpetually enjoining their collection ; and an injunction was also asked as incidental to the principal relief against the collection of a particular tax levied to meet the interest on the bonds. The leading question here was whether the case had been properly removed from the state court, and no consideration was given to the case upon the merits. As to the jurisdiction of this court we said : 'The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability and that contested by the adverse party,

> is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental."

It follows that the matter in dispute does not exceed $2,000, and, also, does not arise under the Constitution or any law of the United States. As said by the court below on pages 27, 28 of the record :

> "But as already indicated, it seems to me to be clear that the decision of this case, if tried on its merits, would inevitably turn upon the construction of the laws of Kentucky, guided by general principles of jurisprudence, and not at all upon a construction of the fourteenth amendment. Double or excessive taxation is not, speaking generally, prohibited to the states by the Federal Constitution, and whether the City of Owensboro has gone further than it had the right to do in collecting the taxes in advance of selling the bonds; whether the complainant has any interest in the money thus collected and accumulated in the treasury of the city, and either not properly applied or else misapplied; whether the city has the right to hold the funds collected, and await further developments as to a wise time for erecting its water works; whether the defendant has misappropriated the money thus collected; whether it has the right to delay the building of the water works, and still hold on to the money collected to pay the interest on the unsold bonds authorized and executed for that purpose; whether the city might not, either

now or near the maturity of the bonds, be compelled to abstain from collecting taxes for a period corresponding with the three or four years previous to this date; whether the city could be compelled to call in, if they were sold, enough of the bonds to correspond with the accumulated taxes on hand, and whether the remaining bonds or only that portion of them which would remain after withholding from sale an amount equal to the accumulated taxes, can now be lawfully and properly sold by the city for the purpose of building its water works, are, I think, all questions to be determined exclusively upon a construction of the laws of Kentucky and upon principles of general jurisprudence. In no essential respect can these questions be determinable upon a construction of the Federal Constitution. So we say again, that if any question of the Federal constitutional law is involved in this case it is merely incidental, and if so, the principles laid down in Sloan v. United States, 193 U. S. 614, and cases therein cited, must control."

Whatever remedy appellant may have had before the collection of the taxes and the sale of the bonds, which, presumably, have been sold before this time, it seems to us, under the averments of the bill, its only remedy is, by mandamus, to require the council to create the sinking fund as provided by section 159 of the Kentucky Constitution. (Berlin Iron-Bridge Co. v. City of San Antonio, (Texas) 50 S. W. 408.) This presents a question solely for the courts of Kentucky to determine upon principles of general jurisprudence. If the money that should have gone into the sinking fund has been diverted, the council may be required, by mandamus, to create the sinking fund out of the

general revenue of the city. Under existing circumstances this relief would remedy all wrong, if any has been committed, and place all parties interested in statu quo. It is ample and complete.

An affirmance is respectfully asked.

CHARLES S. WALKER,
For Appellee.